Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MARILYN SCHMIDT – *Petitioner*

VS.

THOMAS A. GOSCICKI and
ALFRED SIEGEL, TRUSTEE,
Respondents

On Petition For A Writ Of Certiorari

To The

UNITED STATES COURT OF APPEAL

MARILYN SCHMIDT, *In Pro Se*
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39pp

QUESTIONS PRESENTED

A. Did the Bankruptcy Court err in finding that the Order of June 24, 1993, wherein petitioner, MARILYN SCHMIDT ("SCHMIDT" herein) was granted relief from Stay and allowed to proceed in the State Court against respondent, THOMAS GOSCICKI ("GOSCICKI" herein) failed to provide relief from the discharge provisions containing in 11 U.S.C. 523(c)?

B. Did the Bankruptcy Court err in finding that petitioner, SCHMIDT, could not justifiably rely upon its Order of June 24, 1993?

C. Did the Bankruptcy Court err in finding that petitioner, SCHMIDT, should have filed a complaint pursuant to 11 U.S.C. 362 and 523 to determine the dischargeability of respondent, GOSCICKI'S, debt after the Bankruptcy court granted SCHMIDT leave to proceed against GOSCICKI in the State Court on June 7, 1993?

D. Did the Bankruptcy Court err when it concluded that appellant, SCHMIDT, violated the discharge order dated July 20, 1993?

E. Did the Bankruptcy Court err when it concluded that appellant's removal action failed to raise issues related to the dischargeability of respondent, GOSCICKI'S debt to petitioner, SCHMIDT?

F. Did the Bankruptcy Court err when it concluded that appellant's State Court complaint did not properly allege the fraudulent conduct of respondent, GOSCICKI?

G. Did the Bankruptcy Court err when it found petitioner, SCHMIDT, responsible for damages allegedly incurred by respondent, GOSCICKI?

H. Did the Bankruptcy Court err when it concluded that the Doctrine of Extraordinary Circumstances did not apply to this matter?

LISTING OF PARTIES TO THE PROCEEDING

The parties to the proceeding of the Ninth Circuit Court of Appeal were:

Plaintiffs/Respondent

Thomas A. Goscicki

Defendant/Appellant

Marilyn Schmidt

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I. PETITION FOR A WRIT OF CERTIORARI

Petitioner respectively prays that a Writ of Certiorari issue to review the judgment below.

II. OPINIONS BELOW

The order granting Plaintiff's motion for summary of judgment was prepared by Plaintiff's counsel and submitted to the court for signature. (Appendix "A"). The opinion of the Bankruptcy Appellate Panel was published (Appendix "B"). The memorandum of Ninth Circuit Court of Appeals affirming the Bankruptcy Appellate Panel decision (Appendix "C") is unrecorded.

III. JURISDICTION

A. Jurisdiction. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

B. This case comes from the Federal courts. The opinion of the United States Court of Appeal appears at Appendix "C" to the petition and is unpublished.

C. Finality of order and judgment from the Ninth Circuit Court of Appeals. A final judgment was entered on October 13, 1998. This matter was heard by the Ninth Circuit court of Appeals on October 5, 1998. No petition for rehearing was filed in this case.

D. The Parties. All parties appear in the caption of the case on the cover page.

E. Timeliness of the filing of this petition for Writ of Certiorari. This petition for Writ of Certiorari was filed within the ninety day period from the decision reached by Ninth Circuit Court of Appeals.

IV. STATEMENT OF THE CASE

This writ is taken from a Ninth Circuit Court of Appeals order affirming the lower court's decision with respect to the granting of a summary judgment motion in favor of GOSCICKI against SCHMIDT. The bankruptcy court after considering a separate contempt motion filed by respondent against petition, and concluding in said motion that petitioner was not in contempt for continuing to prosecute debtor, GOSCICKI, granted in a separate motion for summary motion filed by GOSCICKI, for the alleged violation of the discharge order by SCHMIDT. The bankruptcy court held that SCHMIDT was liable to GOSCICKI for damages because of the continued litigation of the State court suit after the court's June 7, 1993, ruling. The court discounted the fact that it had ordered, after the barred date, the continuation of the State court proceeding, ruling instead that SCHMIDT violated the discharge order. The court's decision resulted in SCHMIDT paying to GOSCICKI the sum of $25,000.00 for legal fees and costs incurred by GOSCICKI despite the fact that GOSCICKI had damaged SCHMIDT in excess of $1,000.00.

Had SCHMIDT been a resident of New York, Texas or Wisconsin, this matter would not be before this court. As more particularly set forth below, these jurisdictions would have allowed SCHMIDT to proceed against GOSCICKI.

V. CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutory provisions arise in this matter:

a. 11 U.S.C. Section 105
b. 11 U.S.C. Section 341(a)
c. 11 U.S.C. Section 362
d. 11 U.S.C. Section 523
e. 11 U.S.C. Section 9027
f. Bankruptcy Rule 4007(c)

VI. PROCEEDINGS AND DISPOSITIONS

In or about November 1987, SCHMIDT and GOSCICKI agreed to develop certain residential lots owned by SCHMIDT, commonly referred to as Seaview Avenue Lots 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 14 and 15 ("The Lots" herein). At the time of GOSCICKI'S wrongful conduct, The Lots had an appraised value per GOSCICKI in excess of 1.2 million dollars.

In or about April 1992, plaintiff, MARILYN SCHMIDT, filed suit against GOSCICKI, and others, seeking damages on eight (8) separate causes of action including, among others, **Intentional Misrepresentation of Fact, Conversion and Fraud.** The complaint was based upon GOSCICKI'S defalcation of certain funds and theft of The Lots belonging to SCHMIDT from an escrow at Park Place Escrow. GOSCICKI had persuaded SCHMIDT to participate in the escrow under the guise of raising money to begin the project. The assigned escrow officer was ADAMS, which was never disclosed to SCHMIDT before commencement of escrow. As a result of the conduct of GOSCICKI and ADAMS, SCHMIDT lost her interest in The Lots. The Lots were used by GOSCICKI to obtain funds to satisfy personal obligations including paying to his former partner MARLENE JENSON ("JENSON" herein) $60,000. in cash and pledging to her Seaview Avenue lot number 6.

Pursuant to the filing of the State Court complaint, a trial was scheduled for May 1993. In or about March 1993, shortly before GOSCICKI was to be deposed by SCHMIDT, he filed a Chapter 7 bankruptcy proceeding. Plaintiff pursuant to 11 U.S.C. 9027 properly filed an application for removal (which included a cover sheet which advised GOSCICKI that SCHMIDT sought a determination of the dischargeability of his debt) of the State Court complaint to the Bankruptcy Court so that all defendants would be before the Bankruptcy Court. The defendants' activities were very intertwined in the

fraud perpetrated upon SCHMIDT by GOSCICKI and his wife, ADAMS that two separate trials would have been impossible to undertake.

Attached to SCHMIDT'S application for removal was a complete copy of the file of the State Court action. SCHMIDT provided notice of the proceeding to all parties including all State Court defendants, their counsel of record among which was Mr. Michael Candiotti, bankruptcy counsel for respondent, GOSCICKI and Ms. Linda Monroe, State Court counsel for respondent, GOSCICKI. A complete packet of the papers filed pursuant to the removal action including the adversary cover sheet was provided to each of GOSCICKI'S counsel.

On June 7, 1993, the application for removal was considered by the Bankruptcy Court, the Honorable Calvin Ashland. Present was Alex P. Aghajanian, counsel for SCHMIDT, George W. Young, counsel for Algor Enterprises and Sawtelle I-88 and Harvey Katzman counsel for Charles Knotts. Absent was debtor's bankruptcy counsel, Michael Candiotti and State Court counsel, Linda Monroe. In fact the Court queried counsel for SCHMIDT as to why defendant was not present at the proceeding. Respondent, GOSCICKI did not file any opposition to the removal proceeding.

The Bankruptcy Court after considering the evidence presented along with the documents submitted, ordered that the matter be remanded to the State Court **providing relief from stay** where petitioner, SCHMIDT was to proceed with her case against GOSCICKI. Respondent did not object to, or oppose, the Court's order.

On June 24, 1993, the Bankruptcy Court signed the Order allowing SCHMIDT to proceed. It was signed by the Court **after the bar date had passed.** The Order remanded the matter to the State Court and granted relief from the automatic stay so that SCHMIDT could proceed against GOSCICKI in the State Court. The Order at paragraph two provided:

> "The automatic stay provision shall not apply to this proceeding and plaintiff, SCHMIDT may proceed against defendant, GOSCICKI and debtor, THOMAS A. GOSCICKI, an individual dba Tag Development in those certain State Court proceedings entitled MARILYN SCHMIDT vs. THOMAS A. GOSCICKI..."

Acting in reliance on the Court's ruling, SCHMIDT did not file a new discharge complaint with the Bankruptcy Court, but instead continued to prosecute the State Court complaint as ordered by Judge Ashland.

On January 11, 1994, approximately six (6) months after the Bankruptcy Court issued its order remanding the proceeding back to the State Court, GOSCICKI filed a Notice of Motion and Motion to hold SCHMIDT, the creditor, in civil contempt. After a hearing on the matter that occurred on February 22, 1994, the Court denied the debtor's motion allowing SCHMIDT to continue her suit against GOSCICKI in State Court.

After the motion for contempt was denied, GOSCICKI then filed a complaint to have the Court determine that SCHMIDT was discharged. Pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6) SCHMIDT filed a motion to dismiss the complaint based on the Doctrines of Collateral Estoppel and Res Judicata. A hearing occurred with respect to SCHMIDT'S motion to dismiss which Judge Ashland denied. An answer was filed by SCHMIDT with GOSCICKI bringing his summary judgment motion which was granted on August 22, 1994. It should be noted that GOSCICKI actually participated in the State court litigation prior to the entry of judgment.

GOSCICKI'S summary judgment did not seek a determination of the alleged dollar damages suffered by him. This occurred at a separate proceeding.

On appeal, the Bankruptcy Appellate Panel affirmed the Bankruptcy Court's ruling. It should be noted that on April 9, 1997, Adams who filed her own Bankruptcy Petition in Arizona was found liable for her wrongful conduct in this matter with a Summary Judgment being entered against her in excess of $1,000,000.00.

VII. ARGUMENT

A. THE BANKRUPTCY COURT ERRED WHEN IT FOUND THAT THE ORDER OF JUNE 24, 1993, WHEREIN APPELLANT, MARILYN SCHMIDT, WAS GRANTED RELIEF FROM STAY AND ALLOWED TO PROCEED IN THE STATE COURT AGAINST RESPONDENT, THOMAS GOSCICKI, FAILED TO PROVIDE RELIEF FROM THE DISCHARGE PROVISIONS CONTAINED IN 11 U.S.C. 523(C).

(1) SCHMIDT'S removal action properly placed before the Court, the issue of GOSCICKI'S pre-petition debt.

11 U.S.C. 9027 establishes the procedure for the removal of a State Court action to the Bankruptcy court. The removal application shall be filed with the court clerk at the district and division within which the State action is located. All applicable pleadings in the State Court action shall be filed and included in the application.

SCHMIDT complied with all of the requirements of rule 9027 and supplied to the Court in her application, the pleadings and other documents that included her State Court complaint alleging the fraudulent and wrongfully conduct of GOSCICKI. Said complaint clearly set forth the actions which constituted fraud, theft, conversion and the diversion of funds from Park Place Escrow number 2863 by GOSCICKI and his wife, ADAMS. Once the application has been filed, the Bankruptcy Court obtained immediate jurisdiction over it. Therefore, if a timely request for removal was made to the Court,

removal of the case from the State to the Bankruptcy Court is automatic. *In re: Western Helicopter, Inc.* 97 B.R. 3 (e.d. Cal. 1988).

(2) Once the action has been properly removed to the Bankruptcy Court, it may take whatever action it deems appropriate.

> 11 U.S.C. Section 105 provides: "(a) the Court may issue any order, process or judgment, that is necessary or appropriate to carry on the provisions of this title. The provision of this title providing for the raising of any issue by a party in interest shall be construed to preclude the Court from sua sponte, taking any action or making any termination necessary or appropriate to enforce or implement court order or rules, or to prevent an abuse of process."

SCHMIDT properly brought the State Court proceeding before the Bankruptcy Court by her removal action. She, therefore, placed at issue the State Court complaint which clearly sets forth GOSCICKI'S wrongful conduct and raises the issue of dischargeability. GOSCICKI was thus aware of the wrongful conduct which formed the basis of SCHMIDT'S contentions concerning the dischargeability of the debt.

The allegations contained in the complaint clearly set forth fraud, theft, and defalcation. The Bankruptcy Court after reviewing the applicable documents, including the complaint, concluded that the matter should be removed to the State Court. It issued an order allowing SCHMIDT to proceed with her trial against GOSCICKI providing the necessary relief from Stay.

In *Aldridge vs. Imbrogno* 34 B.R. 776 (1983), the court dealing with a dispute between a former husband and wife exercised its discretion

granting relief from the automatic stay pursuant to 11 U.S.C. Section 362. The court modified its Order granting the relief from the automatic stay for the sole and exclusive purpose of allowing a determination by the California State Court as to whether Imbrogno was the owner of the thirty-six percent (36%) interest of plaintiff, *Aldridge's* United States Air Force Military retirement. It is appellant's contention that the logic in *Aldridge* applies to this proceeding. The Order by Judge Ashland clearly stated that GOSCICKI could be tried in the State Court. Said Order was based upon the information provided to the Court at the removal proceeding. Thus, applying the logic of Aldridge to this matter, SCHMIDT should have been allowed to proceed against GOSCICKI as ordered by the Bankruptcy Court.

(3) The removal proceeding meets the requirements of 11 U.S.C. Section 523.

> 11 U.S.C. Section 523 provides: (a) "A discharge under Section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debts...(2) for money, property, services, or any extensions, renewal, or refinancing of credit, to the extent obtained by-(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtors or an insider's financial condition; (B) a use of a statement in writing (i) that is materially false...(iv) that the debtor caused to be made or published with the intent to deceive; or...(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny..."

Therefore, Section 523 requires that the debtor receive knowledge, that he may not discharge a debt owed to the creditor because of fraud, theft, or defalcation.

In re Schwartz and Meyers 64 B.R. 948, 14 B.C.D. 1205(B.C S.D. N.Y 1996), the court set forth the principle that a creditor's document satisfies Bankruptcy Rule B.R. 7008(a) as a sufficient pleading of an objection to discharge of a debt owed by a Chapter 7 debtor, even though the document bore no caption and was sent to the bankruptcy judge because the document referred to the Section of the bankruptcy code on non-dischargeability, alleged various frauds, attached various exhibits, and contained in some form, name and number of the case.

The evidence presented to this Court clearly indicates that such notice was given. The removal proceeding placed before the Bankruptcy Court and debtor, GOSCICKI, the State Court complaint which clearly alleged fraud and theft. The second cause of action of the complaint was for intentional misrepresentation brought against GOSCICKI by SCHMIDT. The sixth cause of action seeks damages for GOSCICKI'S fraudulent conduct. The entire complaint asserts the theft of property, the diversion of funds, all of which were undertaken by GOSCICKI or individuals controlled by him, including his wife, ADAMS.

Obviously, if the Bankruptcy Court had concluded that the matter should have remained before it, the issues with respect to the fraudulent conduct and defalcation of GOSCICKI would have been litigated before the Bankruptcy Court, falling within and meeting the requirements of 11 U.S.C. Section 523. No further pleadings would have been required. The Bankruptcy Court could have concluded from the documents placed before it by the removal proceeding (including certain discovery) the liability and/or dischargeability of the debt between SCHMIDT and GOSCICKI. *In re: American Spilling Mills, Inc.*, 43 B.R. 365 (1984).

The State Court complaint properly brought before the Bankruptcy Court meets the requirements when filing a complaint to determine dischargeability. It fully and completely apprised GOSCICK

and the Court concerning the non-dischargeable debt owed SCHMIDT by GOSCICKI.

Further, for almost two (2) years GOSCICKI had been litigating the issues brought before the Bankruptcy Court by the removal application. The removal of the State proceeding to the Bankruptcy Court did not alter or change the assertions contained in the complaint as they related to fraud and/or theft. GOSCICKI had responded to these allegations and was conducting a vigorous defense at the State Court level. His defense would not have changed had an additional complaint concerning dischargeability setting forth the very same issues alleged in the State Court had been filed in the bankruptcy court.

GOSCICKI was in fact placed on notice that petitioner contended that the debt was not dischargeable by the Adversary Cover Sheet which was served on GOSCICKI'S counsel. It clearly set forth that the debt was not dischargeable and SCHMIDT intended to seek such a determination.

It is, therefore, unnecessary for SCHMIDT to have refiled a separate dischargeability complaint once the Bankruptcy Court had assumed jurisdiction over this matter and ordered it tried at the State Court level.

(B) THE BANKRUPTCY COURT ERRED WHEN IT DID NOT APPLY THE DOCTRINE OF UNIQUE CIRCUMSTANCES TO THIS MATTER.

(1) The principles of Bankruptcy Rule 4007(c) should not have been applied to this matter.

Bankruptcy Rule 4007(c) provides that a complaint to determine dischargeability of a debt must be filed no later than sixty (60) days following the first date set for the meeting of creditors held

pursuant to 11 U.S.C. 341(a). This rule has been strictly construed by the Ninth Circuit and the Bankruptcy Appellant Panel where a creditor simply misses the bar date through neglect or failure to monitor a bankruptcy case. In *In re: Santos* 112 B.R. 1001 (9th Cir. Bap 1990), the court held that the time limits under Rule...4007 are not jurisdictional and therefore are subject to equitable estoppel and waiver. A recognized exception to this rule is the Doctrine of Unique Circumstances.

In *Marino vs. Marino*, 37 F.3d 354 (9th Cir. 1994) the court stated that the doctrine of unique or extraordinary circumstances applies where a court explicitly misleads a party.

As clearly set forth herein, SCHMIDT placed reliance upon the Order of the Bankruptcy Court and proceeded as directed to litigate her State Court complaint. She was directed by the Bankruptcy Court to proceed at the State Court level and she was not required, as evidenced by the Court's order **signed after the bar date,** to file a complaint to determine dischargeability. Instead she was provided relief from Stay so she could proceed. Thus, SCHMIDT justifiably relied upon the Order of the Court acting to her detriment as the bar date passed and a complaint for dischargeability was not filed. The Court's order mislead SCHMIDT into believing that a dischargeability complaint was not necessary and that the issues with respect to the obligation owed to her by GOSCICKI could be resolved at the State Court level. SCHMIDT could reasonably and justifiably rely on the Order of the Court, which she did to her detriment.

In *re Anwiler*, 958 F.2d 925 (9th Circuit 1992) which was cited by *Marino*, the court affirmed the denial of a motion to dismiss a dischargeability complaint when the clerk's office sent out two (2) notices concerning the bar date. The holding in In *re Anwiler* has been followed in the Tenth Circuit [In *re Themy* 6 F.3d 688, 690 (1993)] and the Sixth Circuit [In *re Isaacman* 26 F.3d 629 (1994)]. SCHMIDT contends that the principles set forth in *Marino* and *Anwiler* applies

to this matter. She was misled and relied upon the Court's order to her detriment losing her opportunity to seek redress for the wrongful conduct of the debtor. As set forth in *Isaacman* at page 32 "...the Bankruptcy Court should exercise its equitable powers...to hold otherwise, we believe would create an unjust result because parties are entitled to rely on information issued by Bankruptcy Court."

In *re Lambert, III* 76 B.R. 131 (e.d. Wisconsin 1985), the Court concluded that a creditor's motion for relief from Stay to permit them to pursue misrepresentation claims in the State Court can properly be construed as a motion to extend time for filing a complaint to determine dischargeability of a debt until the State litigation had been concluded.

SCHMIDT contends that the principles set forth in *Lambert* apply to this matter and are directly applicable herein. The Bankruptcy Court reviewed and concluded at a properly noticed removal proceeding that relief from stay should be granted and that the State Court complaint brought before it sought damages for fraud, defalcation and misappropriation of SCHMIDT'S property. It concluded that these issues should be litigated at the State Court level. Therefore, like the court in *Lambert*, the Bankruptcy Court allowed SCHMIDT to continue the State Court litigation to Schmidt's detriment.

In *In re: Sherf* 135 B.R. 810 (S.D. Tex 1991), the court considered the issue of whether or not the creditor's filing of their initial objection and their subsequent filed complaint before the bar date constituted an informal complaint thus allowing their amended or former complaint to be filed after the bar date. The court also considered the issue of whether or not the creditor's initial objection and/or their original complaint can be construed as a motion to extend the time for filing an amended complaint to determine the dischargeability of a debt. The court following the holding in *Lambert* stated at page 815:

> "We join with the court in *Lambert* in holding that a pleading that is filed before the bar date which puts the debtor on notice as to the creditor's objections may be treated as a motion to extend the time for filing a complaint."

Applying the principles set forth in *Lambert*, and *Sherf* SCHMIDT'S removal action and order issued by the Bankruptcy Court should be construed as a motion to extend the time for filing a complaint to determine dischargeability subject to the outcome of the State Court litigation, **which is currently stayed and pending the outcome of this matter.** By doing so, the true intent of the Bankruptcy Court's order may be met with the parties determining the issues with respect to the dischargeability of the debt owed GOSCICKI by SCHMIDT. The Doctrine of Unique Circumstances should have been applied to this matter allowing SCHMIDT to proceed at the State Court level denying the request for summary judgment.

(2) The Bankruptcy Court erred when it failed to apply theprinciples set forth in Bankruptcy Rule 105(a).

Under the doctrine of "unique circumstances" courts have used its equitable power pursuant to 11 U.S.C. Section 105 extending the time to file a late complaint objecting to discharge. *Sherf* supra at page 814. Thus Bankruptcy Rule 105(a) allows the court to make any order necessary to correct its own mistake. Also, see *Marino* supra. The Bankruptcy Court's power under Rule 105(a) becomes meaningless unless the Court converts its own mistakes. *Anwiler* supra. The Bankruptcy Court had, prior to granting respondent's summary judgment motion, concluded that SCHMIDT was not in contempt, allowing the continued prosecution of her state court complaint to her detriment. It was therefore an error by the Bankruptcy Court to grant the summary judgment motion.

The Bankruptcy Court should have denied the motion. It should have issued an Order allowing the action to either be tried in the Bankruptcy Court as was originally sought by SCHMIDT, or allow her to proceed at the State Court. This would have corrected the error by the Court that lead to the justifiable reliance by SCHMIDT that she could proceed at the State Court level against GOSCICKI. SCHMIDT successfully concluded her action against ADAMS obtaining a judgment in excess of $1,000,000 against her for the very conduct SCHMIDT alleges GOSCICKI undertook. Further, it would have also facilitated the proper resolution of the SCHMIDT/ GOSCICKI dispute. The Bankruptcy Court, by allowing SCHMIDT to proceed at the State Court level, could have then retained jurisdiction over this matter. It could have ordered its return after the conclusion of the State Court litigation for further proceedings. Having failed to do so, the court erred by not applying the principles set forth in Rule 105(a).

VIII. PETITIONER HAS SET FORTH CLEAR AND CONVINCING EVIDENCE THAT HER HER PETITION SHOULD BE GRANTED

Currently, in reviewing the existing law between the various circuits, a conflict exists with respect to the ability of a creditor to seek payment from a debtor who has unquestionably committed a fraud. That conflict arises when the court, not only misleads the creditor into believing that she may proceed, but fails to correct its own mistake thereby failing to restore the creditor's rights. If petitioner had brought this action in a jurisdiction such as Wisconsin or Texas, where the *Lambert* and *Sherf* were decided, her application for removal would be construed as an extension of time to file a complaint thereby allowing her to proceed.

If she had brought this action in New York, her filing of her removal action would meet the requirements of Rules, 7008 and she would have been allowed to proceed.

It is quite clear that the bankruptcy code places certain requirements on creditors with respect to notice and filing of documents to determine the dischargeability of a debt. In the Ninth Circuit, those requirements have been strictly construed thereby causing petitioner to suffer a grieves wrong. While the Ninth Circuit does follow, under given circumstances, the unique circumstances doctrine which has been cited in cases in the Tenth and Sixth Circuits, the Ninth Circuit chose not to follow said principle in this matter. This is tantamountly unfair to the petitioner in that it was the Bankruptcy court who directed her conduct in this matter. The Bankruptcy court went as far as to execute the order providing relief from stay and remanding the proceeding back to the State court after the expiration of the bar date.

As discussed above, another inconsistency arises when as in this case, petitioner sought relief from stay to proceed against GOSCICKI in the State court. The bankruptcy court granted said relief but subsequently held against her granting judgment in favor of GOSCICKI. The *Lambert* court in Wisconsin consider the relief of stay action to be a motion to extend the time to file a complaint to determine dischargeability of a debt until the State litigation had been concluded. The Ninth Circuit has chosen not to recognize this principle. This inconsistency has damaged petitioner.

The petition clearly demonstrates that pursuant to 11 U.S.C 9027, a proper removal proceeding was brought placing the State court litigation between SCHMIDT and debtor, GOSCICKI before the bankruptcy court. The facts and evidence presented to the bankruptcy court clearly established that: (1) The State court complaint properly alleged damages for fraud and defalcation; (2) That an error by the bankruptcy court occurred concerning its conclusion that the complaint failed to set forth the necessary elements to advise GOSCICKI that his debt owed to SCHMIDT was not dischargeable; (3) An order was issued by the bankruptcy court allowing SCHMIDT to proceed against GOSCICKI at the State court level granting relief from stay

which was signed by the court after the bar date; (4) SCHMIDT justifiably relied upon to her detriment the order executed by the court; and (5) SCHMIDT was not in contempt by the court's own ruling for her alleged violation of the discharge order.

The bankruptcy court erred when it failed to conclude that the Doctrine of Unique Circumstances applied to this matter. Clearly, SCHMIDT justifiably relied on the bankruptcy court's order allowing her to proceed in the State court to her detriment. This being the case, the court should have applied the Doctrine of Unique Circumstances retaining jurisdiction over the proceedings.

By granting the petition, this court has the ability to level the playing field. With the rise of the filings of bankruptcy petitions, both rightfully and wrongfully and with the ever increasing inability of a creditor to collect funds due, it is important that a creditor be provided a fair opportunity to exercise her rights.

IX. CONCLUSION

For the reasons set forth herein, petitioner request that this court grant her petition.

Respectfully submitted,

Dated: 2/25/99 by: Marilyn Schmidt

MARILYN SCHMIDT
In Pro Se

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Attorney for Plaintiff,
THOMAS A. GOSCICKI

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	)	CASE NO: LA93-19414 CA
	)	
THOMAS A. GOSCICKI,	)	(Chapter 7)
Debtor.	)	ADV.NO.AD94-02154 CA
	)	
THOMAS A. GOSCICKI,	)	
Plaintiff,	)	ORDER GRANTING
	)	PLAINTIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
v.	)	
	)	DATE: 8/22/94
	)	TIME: 2:00 P.M.
MARILYN SCHMIDT,	)	
PATRICIA PARKER, PARK	)	COURTROOM 1639,
PLACE ESCROW CO., INC.,	)	16th Floor,
CHARLES E. KNOTTS,	)	255 East Temple St.
Defendants.	)	Los Angles, California
	)	

Upon the Notice of Motion and Motion for Summary Judgment filed August 1, 1994, this matter came on regularly for hearing on August 22, 1994, at 2:00 P.M., before the Honorable Calvin

Ashland, United States Bankruptcy Judge, in Courtroom 1639, located at 255 East Temple St., Los Angeles, California. Plaintiff was represented by his counsel, Michael H. Candiotti. Defendant Marilyn Schmidt was represented by her counsel, Alex P. Aghajanian.

That the Court having read and considered the motion, the Opposition filed by the Defendant, Plaintiff's Reply thereto, Defendant's Response to the reply, the oral argument of counsel at hearing thereon, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Plaintiff's Motion for Summary Judgment is granted;
2. The prepetition claims of defendant MARILYN SCHMIDT, as set forth in *Marilyn Schmidt v. Thomas A. Goscicki*, Superior Court Case No. BC056163, are and were discharged pursuant to the Discharge of Debtor issued in this case on July 20, 1993;
3. Such Discharge includes all the injunctive and other relief set forth in 11 U.S.C. 524(a)(1)(2);
4. Defendant, MARILYN SCHMIDT has violated the Discharge;
5. Defendant, MARILYN SCHMIDT is liable for any and all damages caused to plaintiff by her violation of the Discharge, the nature and amount of such damages to be determined at a further hearing to be noticed by Plaintiff; and,
6. Reference is made to the Findings of Fact and Conclusions of Law Re Summary Judgment filed concurrently herewith and same are incorporated as though fully set forth.

DATED: September 6,1994

by: /S/
Hon. CALVIN ASHLAND, United States Bankruptcy Judge.

UNITED STATES BANKRUPTCY APPELLATE
PANEL OF THE NINTH CIRCUIT

In re		
	)	BAP No. CC-94-2138-HVO
THOMAS A. GOSCICKI,	)	
Debtor.	)	Bk. No. LA93-19414-CA
	)	
MARILYN SCHMIDT,	)	Adv. No. LA94-02154-CA
Appellant,	)	
	)	
v.	)	OPINION
	)	
THOMAS A. GOSCICKI and	)	
ALFRED SIEGEL, Trustee,	)	
Appellees.	)	
	)	

Argued and Submitted on November 20, 1996 at Pasadena, California

Filed - 2/25/97

Appeal from the United States Bankruptcy Court for the Central District of California

Honorable Calvin K. Ashland, Chief Bankruptcy Judge, Presiding

Before: HAGAN, VOLINN, and OLLASON,
Bankruptcy Judges.

HAGAN, Bankruptcy Judge:

FACTUAL STATEMENT

Marilyn Schmidt ("Appellant") appeals an order granting Thomas Goscicki's ("Debtor") motion for summary judgment in an adversary proceeding. We affirm.

On April 24, 1992, the Appellant filed an action against the Debtor in the California Superior Court. The complaint was based on the following causes of action: breach of contract, intentional misrepresentation of fact, negligent misrepresentation of fact, breach of the implied covenant of good faith and fair dealing, tortious breach of contract, conversion, payment on bond, rescission and restitution, and constructive trust. The Appellant was represented by Alex P. Aghajanian, Esq.[1] in both the Superior Court action and an adversary proceeding before the bankruptcy court.

These causes of action arose from an agreement between the parties to develop lots owned by the Appellant and as a result of the recordation of certain deeds. The Debtor filed a cross-complaint against the Appellant in state court.

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[1]Mr. Aghajanian is also a named appellant in this case.

On March 18, 1993, the Debtor filed for relief under chapter 7, title 11, United States Code[2]. The Debtor listed the Appellant as a creditor and the Appellant's claim on schedule "F" was listed as an unliquidated, disputed claim. The Appellant's name and her attorney's name and address appeared in the Creditor's Matrix. On March 18, 1993, Debtor's counsel served written notice of the bankruptcy filing upon counsel for the Appellant. On March 25, 1993, Debtor's counsel served additional written notice of the bankruptcy filing upon the Appellant's counsel. On March 29, 1993, the Clerk of the Bankruptcy Court served a "Notice of Commencement of Case Under Chapter 7 of the Bankruptcy Code" on the Appellant.

On April 21, 1993, the Appellant and her attorney attended the meeting of creditors held pursuant to Section 341(a). Appellant's attorney participated in the meeting and questioned the Debtor under oath.

On April 2, 1993, Appellant filed an "application to remove the Superior Court case to Bankruptcy Court." On June 7, 1993, at a hearing before the bankruptcy court regarding Appellant's removal of the Superior Court case, the case was remanded to the state court. Appellant's counsel prepared the resulting order granting relief from the automatic stay to allow the debtor to proceed in the Superior Court. The order remanding the case to the Superior Court was signed on June 24, 1993, three (3) days after the cut-off date for filing exceptions or objections to discharge in the bankruptcy case.

On July 20, 1993, the Clerk of the Bankruptcy Court issued a notice of the Debtor's discharge pursuant to Sections 524 and 727. On August 1, 1993, Debtor's counsel served written notice of the

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[2]Unless otherwise indicated, all references to "chapter" and "section"are to the Bankruptcy Code, 11 U.S.C. sections 101-1330, and all references to "rule" are to the Federal Rules of Bankruptcy Procedure ("Fed.R.Bank.P.") 1001-9036, which make applicable certain Federal Rules of Civil Procedure ("Fed.R.Civ.P.")

discharge upon Appellant's counsel. The Appellant continued to prosecute her Superior Court action against the Debtor despite this notice. The Debtor filed a motion for contempt, heard on February 24, 1994, that was denied. The Debtor then filed a complaint seeking a determination of the status of Appellant's claim based on the fact the bankruptcy case had been discharged. The Appellant filed a motion to dismiss that was denied, and an answer to Debtor's complaint. The Debtor then filed a motion for summary judgment. At a hearing on August 22, 1994, this motion was granted. The summary judgment order was entered on September 6, 1994.

ISSUE PRESENTED

Did the bankruptcy court err in granting Debtor's motion for summary judgment?

STANDARD OF REVIEW

A summary judgment is reviewed *de novo*, as are the court's conclusions of law determined therein. *Wolkowitz v. Shearson Lehman Brothers, Inc. (In re Weisberg)*, 193 B.R. 916, 921 (9th Cir. BAP 1996); *In re Florida*, 164 B.R. 636, 639 (9th cir. BAP 1994).

> [F]indings of Fact and Conclusions of Law . . . may be dispensed with pursuant to Fed.R.Civ.P. 52(a), made applicable in adversary 8b proceedings through B.R. 7052. Because of the nature of summary judgment, such "findings" are not findings of fact in the conventional sense that the trial court has weighed the evidence and resolved disputed factual issues. The "clearly erroneous" standard of B.R. 8013 is therefore inapplicable. See *Heiniger v. City of Phoenix*, 625 F.2d 842, 844 (9th Cir.1980) (citations omitted).

American Federation of State, County and Municipal Employees, Local 2051 v. Stephens, (In re Stephens), 51 B.R. 591, 594 (9th Cir. BAP 1985).

This Panel stands in the same position as the court below in applying the standards set forth in

Fed.R.Civ.P. 56(c). *In re Stephens*, 51B.R. at 595.

> In deciding whether to affirm, this Court applies the standard contained in Fed.R.Civ.P. 56(c) and Fed.R.Bank.P. 7056(c), i.e., whether "after viewing all evidence and factual inferences in the light most favorable to the nonmoving party, that there are no genuine issues of material fact and that the moving party is entitled to prevail as a matter of law."

Parkhill v. Nusor (In re Nusor), 123 B.R. 55, 57 (9th Cir. BAP 1991); quoting *In re Pioneer Technology, Inc.*, 107 B.R. 698, 700 (9th Cir. BAP 1988).

Record of Proceedings

The record of proceedings presents the following facts. Appellant Marilyn Schmidt was listed as a creditor and her claim was scheduled in the chapter 7 case filed by the Debtor on March 18, 1993. The Appellant's state court attorney, Alex Aghajanian, had actual notice of the chapter 7 case filing not later than March 23, 1993. The Appellant had actual knowledge of Debtor's chapter 7 filing on April 21, 1993, which was 60 days prior to the June 21, 1993, dischargeability complaint deadline when she and her attorney attended the Meeting of Creditors pursuant to Section 341(a). The Appellant did not file a complaint to determine dischargeability,as required by Section 523(c)(1).

In June 24, 1993, order remanding the case to state court contained the following language: "[t]he automatic stay provisions shall not apply to this proceeding and...Marilyn Schmidt...may proceed against DEFENDANT and DEBTOR, Thomas A. Goscicki...in those certain State Court proceedings...." The court also issued an order providing relief from the stay order.

Appellant's Contentions

The Appellant argues the debt was not discharged under Debtor's chapter 7 discharge for the following reasons: the adversary proceeding cover page operates as a bar to dischargeability, the bankruptcy court removed (remanded) the action to state court, and the "unique circumstances" doctrine should be invoked to operate as a bar to dischargeability since the appellant relied on the court's remand.

Discussion

On April 2, 1993, the Appellant's attorney signed an adversary proceeding cover sheet. Under the section "Cause of Action" had been typed "Fraud in the sale and transfer of real property pursuant to 11 U.S.C. Section 523." The section of the form marked "Nature of the Suit" had a box labeled "To determine the dischargeability of a debt 11 U.S.C. section 523." This box was not checked. This document was not file stamped, there was no Notice of service attached, and no adversary proceeding number. The adversary proceeding cover sheet was insufficient to operate as a complaint to determine dischargeability.

A chapter 7 discharge serves to release an individual from a debt provided the debtor has complied with certain Code provisions. The Debtor listed the lawsuit with the Appellant on his schedules. The discharge would serve to void any potential judgment that the Appellant might recover unless the debt fell into certain categories.

Section 523 provides for various exceptions from discharge:

(a) A discharge under section 727. . . of this title does not discharge an individual debtor from any debt –

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

(A) false pretenses,...or actual fraud...;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, Section 532(a)(2)(A). If a debt falls under this category, Rules 4004(a) and 4007(c) provide that a complaint to determine dischargeability of a debt shall be filed "not later than 60 days following the first date set from the meeting of creditors held pursuant to section 341(a)." In this case, the meeting of creditors took place on April 21, 1993; the claims cut-off date was June 21, 1993.

Section 524(a)(1) provides that a discharge:

> (a)(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section727,...of this tile, whether or not discharge of such debt is waived, (a)(2) operates as an injunction against the commencement or continuation of an action...

The Appellant argues that because the state court complaint was part of the removal application, the bankruptcy court and the Debtor had sufficient notice of the potentially nondischargeable fraud issues. Since the bankruptcy court then concluded the matter should be remanded to the state court, and was aware of the allegations of

fraud, theft, and defalcation, and the Appellant relied on that order, she should not be precluded from raising the non-dischargeability issue.

In *Allred v. Kennerley (In re Kennerley)*, 995 F.2d 145 (9th Cir. 1993), the bankruptcy court barred further proceedings against a discharged debtor in state court.

> Debts set forth in 523(a), including debts for fraud, are excepted from discharge in bankruptcy. However, section 523(c) specifies that some of these non-dischargeable debts, including debts for fraud, will be discharged unless the creditor requests the bankruptcy court to determine the dischargeability of the claim. Rule 4007 imposes a strict 60-day time limit for filing complaints to determine dischargeability of debts listed in section 523(c).

Id. At 146. In *In re Kennerley* the discharged creditor had raised arguments similar t those raised by the appellant in this case; some action by the creditor other than filing a complaint to determine dischargeability operated to relieve the creditor of that requirement, and unique circumstances would permit an untimely claim of non-dischargeability. The creditor had argued that his motion for stay relief was a valid complaint to determine dischargeability. The court noted that the motion and notice of the motion did not mention Section 523(c).

In the instant case, the Appellant attempts to distinguish *In re Kennerley* by arguing that her motion was one to remand, not merely a motion for stay relief. This distinction is not the basis of the *Kennerley* decision, where the court determined that the creditor did not intend for the motion to serve as a complaint based on the failure to mention Section 523(c).

The Appellant further argues that the notice to the bankruptcy court of potentially non-dischargeable claims is sufficient to prevent her from being discharged. This type of "notice" does not substitute for the filing of an adversary proceeding specifically objection to a debtor's discharge.

The Appellant argues that under the Bankruptcy Appellate Panel decision in *Aldrich v. Imbrogno (In re Aldrich)*, 34 B.R. 776 (9th Cir. BAP 1983), the bankruptcy court should not have discharged the debtor until the state court ruled on issues relating to dischargeability. In *In re Aldrich* the bankruptcy court exercised its discretion in granting relief from the automatic stay. The Bankruptcy Appellate Panel found that the bankruptcy court, on the facts before it, had concurrent, not exclusive jurisdiction over the dischargeability determinations under section 523(a) and therefore remanded. However, *In re Aldrich* is distinguished from the instant case. Here the bankruptcy court responded to Appellant's remand request that the state court determine the Appellant's claims, and, in effect, abstained from hearing the claims issues in favor of the state court. The court was not presented with nor did it rule on any issue relating to dischargeability. Yet, as indicated in *In re Aldrich*, dischargeability issues relating to the type of action brought by Appellant, primarily tortious conduct under sections 523(2), (4), (6), are within the exclusive jurisdiction of the bankruptcy court.

> For our purposes, the exceptions to discharge are divided into two major groups; those debts as to which the bankruptcy courts have exclusive jurisdiction to determine exceptions from discharge and those debts where the bankruptcy court does not have such exclusive jurisdiction. This grouping is created by 11 U.S.C. Section 523(c) which gives bankruptcy courts exclusive jurisdiction to determine the dischargeability of debts under 11 U.S.C. Section

> 523(a)(2), (fraud or deception); (a)(4), (fiduciary fraud, embezzlement or larceny); and (a)(6), (wilful and malicious injury to person or property). Bankruptcy Rule 409, which was then applicable, set forth the procedures for determining dischargeability of a debt in the bankruptcy court. Rule 409(a)(1) requires that an adversary proceeding be initiated to determine dischargeability under 11 U.S.C. Section 523(a)(2), (a)(4), and (a)(6). A complaint must be filed in the bankruptcy court within the period set by the court. B.R. 409(a)(2). Failure to initiate timely an adversary proceeding for dischargeability under these subsections of 11 U.S.C. Section 523 may result in discharge of a debt despite the fact that it might be of a character that would otherwise be excepted from discharge.

In re Aldrich, 34 B.R. at 779-780 (citations omitted). The trial court's ruling did not relieve the Appellant of the creditor's obligation, under 4007(c), to file an action for a determination of the dischargeability of the claim.

The Appellant argues that if the court had retained jurisdiction of the case, it would have ruled on the dischargeability of the claim. The court remanded the case to state court for ruling on the state claims and has no obligation to manage the creditor's case.

There are no material facts in dispute in this case. The statutes and rules prescribe a particular avenue for claim dischargeability. The Appellant did not pursue it.

Unique Circumstances

The Appellant alleges she has a right to continue with the state court claim under the "unique circumstances" doctrine. "[A]lthough

courts within the Ninth Circuit have indicated in dicta that there is an exception to Rule 4007(c)'s time limit for 'unique' or 'extraordinary circumstances', the validity of the doctrine remains doubtful." *In re Kennerley*, 995 F.2d at 147. (Footnote omitted). In *Classic Auto Finishing v. Marino (In re Marino)*, 37 F.3d 1354, 1357 (9th Cir. 1994), the court noted the repudiation of the "unique circumstances" doctrine in *Kennerly* and held that if equitable powers to extend the time for filing under section 4007(c) exist at all, they are limited to 'situations where a court explicitly misleads a party.'" (quoting *In re Kennerley*, 995 F.2d at 148). In the present case the order of the court remanding the Appellant's cause of action to state court did not serve to mislead the creditor.

The bankruptcy court was within its discretion to remand a state cause of action with numerous parties to state court. The remand does not serve to vitiate the responsibility of the creditor to comply with the bankruptcy code and the rules in filing a creditor's claim. The court provided the required notice to the appellant. There is nothing in the record which would indicate the court misled the creditor or in any way contributed to Appellant's failure to comply with the requirement of section 523.

Looking at the matter in hindsight, it may be, in light of the motion's obscurity of purpose, that inquiry and a considered review might have developed a dischargeability purpose in appellant's motion. However, it was not the court's obligation to enquire of counsel as to whether he intended to pursue an alternative course as to dischargeability. There is no demonstration here that the court clearly and actively engaged in a material misdirection of a litigant. Such a showing is a prerequisite to invocation of the doctrine of unique circumstances.

Any pre-petition obligation owing by the Debtor to the Appellant was discharged pursuant to the Discharge of Debtor issued in the chapter 7 case on July 20, 1993. WE AFFIRM.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE THOMAS A. GOSCICKI, dba TAG DEVELOPMENT CO., Debtor.	)	
	)	CA No. 97-55478
MARILYN SCHMIDT, Appellant,	)	BAP No. CC-94-2138-HVO
v.	)	BK. NO. LA93-19414-CA
THOMAS A. GOSCICKI, and ALFRED SIEGEL, Trustee, Appellees.	)	MEMORANDUM[1]

Appeal from the United States Bankruptcy Appellate Panel
for the Ninth Circuit Court of Appeals

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir.R.36-3.

Hagan, Volinn, Ollason, Judges Presiding
Submitted October 5, 1998[2]
Pasadena, California

BEFORE: BRUNETTI, FERNANDEZ and McKEOWN,
Circuit Judges

Marilyn Schmidt appeals the Bankruptcy Appellate Panel's affirmance of the bankruptcy court's order granting debtor Thomas Goscicki's motion for summary judgment. The bankruptcy court held that because Schmidt failed to file a complaint to determine dischargeability of her claims pursuant to 11 U.S.C. section 523(c), Schmidt's pre-petition state court claims against Goscicki were discharged pursuant to 11 U.S.C. section 524(a). We affirm.

Schmidt's "Application to Remove" her pending state court litigation and the bankruptcy court's order granting relief from the stay did not excuse her from the requirement of filing a timely complaint to determine dischargeability under 11 U.S.C. section 523(c) and Bankruptcy Rule 4007(c). See *Allred v. Kennerely (In re Kennerely)*, 995 F.2d 145, 146-47 (9th Cir. 1993); *Wood v. Jasperson (In re Jasperson)*, 116 B.R. 740, 744-46 (Bankr. S.D. Cal. 1990)[3]

Nor does the doctrine of "unique circumstances" provide relief for Schmidt. The Bankruptcy court did not "explicitly mislead" her into believing that she was not required to file a nondischargeability complaint. See *e.g., Kennerly*, 995 F.2d at 147-48.

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[2]The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P.34(a); 9th Cir. R.34-4.

[3]Jaspeson also disposes of Schmidt's argument that the "Adversary Proceeding Cover sheet" filed with her Application to Remove distinguishes her case from Kennerley because the sheet states that pleading is for "Fraud in the sale and transfer of real property pursuant to 11 U.S.C. section 523." Jasperson 116 B.R. at 745 (cover sheet to application for removal is not a nondischargeability complaint).